and prejudicial to the plaintiffs who, unless remedial measure is available and taken, will be made to suffer owing to no fault of their own or their advocates. Can anything be done about it? In *Kirk* v. *Dolby*[4] the writ of summons was mistakenly dated and it was held that the court had power to order amendment of the date thereon to correspond with that appearing on the praecipe which was correctly dated. The question of statutory limitation of the action did not arise in *Kirk* v. *Dolby*, whereas, in the instant case, limitation of action is in issue, there is therefore all the more reason that amendment should be allowed. I therefore direct that the date "November 14, 1977" appearing in the writ of summons in this action be amended to read "November 2, 1977".

Furthermore, section 6(1) of the Limitation Ordinance (Cap. 49) provides, in my view, yet another ground for holding that the claim of the 1st plaintiff is not barred by limitation. As stated earlier, the 1st plaintiff is an infant suing by his father and next friend. Section 6(1) of the Limitation Ordinance provides:

"If a person entitled to institute a suit is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the Schedule."

My view seems to have support from some Indian authorities which, though not binding upon this court, are of persuasive value and should be respected. Section 6(1) of our Limitation Ordinance is materially similar to section 6(1) of the Indian Limitation Act 1908.

Section 6(1) of the said Indian Act, so far as material, provides:

"Where a person entitled to institute a suit is, at the time from which the period of limitation is to be reckoned, a minor, or insane or an idiot, he may institute the suit xxx within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first Schedule."

In *Ponnamma & Anor.* v. *Padmanabhan & Ors.*[5] the judgment when dealing with section 6 of the Indian Act said (page 167):

"The wording of the section makes it clear that even if a person is a minor it will be open to his next friend to institute a suit. Although a guardian is not obliged to file a suit, there is nothing prohibiting him from filing one on behalf of a person while he continues under a disability after the ordinary period of limitation."

In *Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy & Ors.*[6] on a construction of section 11 of the Indian Limitation Act 1859, the relevant effect thereof is materially similar to that of section 6(1) of our Limitation Ordinance, it was held that although the ordinary prescribed period of limitation had expired, an infant could bring a suit by his guardian whilst the disability of infancy continued. Sir J.S. Colvile said (page 166):

"...the only other point to be considered on this question of limitation is whether the learned judge was right in holding that an infant cannot after the expiration of the year bring a suit by his guardian whilst the disability of infancy continues. Their Lordships cannot agree in this construction, which, it would appear from the cases cited by Mr. Bell — *Kamchunder Roy* v. *Umbica Dossee* (7 W.R., 161, *Ram Ghose* v. *Greedhur Ghose* (14 W.R. 429), and *Suffuroonnisen Beebee* v. *Koorul Hossein* (17 W.R. 419) — has not been accepted or followed by the Courts in India. It is unreasonable in itself, since it implies that the infant's claim, which is admittedly not barred, was asserted too soon rather than too late; and it cannot be the policy of the law to postpone the trial of claims. Again, to render such a construction imperative, the phraseology of the 11th section must be altered by making the words "after the disability shall have ceased" precede, instead of follow, as they do, the words 'within the same time.' Their Lordships are, therefore, of opinion that the plaintiff's suit is not open to the objection that, in so far as it concerns the properties in question in Hon. 238, 240, and 245, it has not been brought within the proper time."

For the above reasons, I hold that the defence that the action is statute-barred failed.

As to costs, since the state of affairs was not brought about by the fault of the plaintiffs, nor could the defendants be said to have been unreasonable in raising the issue, there shall be order that costs be in the cause.

Order accordingly.

Solicitors: *Goh & Liew; Ee & Lim.*

NATIONAL UNION OF HOTEL, BAR AND RESTAURANT WORKERS v. THE INDUSTRIAL COURT & ANOR.

[O.C.J. (Hashim Yeop A. Sani J.) October 6, 1980]
[Kuala Lumpur — Originating Motion No. A8 of 1979]

Administrative Law — Certiorari — Award of Industrial Court — Alleged error of law in interpretation by Industrial Court — Error did not affect jurisdiction — Industrial Relations Act, s. 32(3).

Industrial Law — Award of Industrial Court — Alleged error of law — Error did not affect jurisdiction — Employment Ordinance, 1955, s. 24(2)(b) — Industrial Relations Act, 1967, s. 32(3).

The applicant had applied for an order of *certiorari* in respect of an award made by the Industrial Court. It was alleged that the Industrial Court had made errors of law in the interpretation of the collective agreement and of section 24(2)(b) of the Employment Ordinance, 1955.

Held: the error or errors did not affect the jurisdiction of the Industrial Court and therefore the High Court had no jurisdiction to quash the decision by *certiorari* proceedings.

Cases referred to:-

(1) *South East Asia Firebricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturers Employees Union & Ors.* [1980] 2 M.L.J. 165.

(2) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.

(3) *Pearlman* v. *Harrow School* [1979] 1 Q.B. 56, 74.

ORIGINATING MOTION.

T. Thomas for the applicant.

C.V. Das for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: On August 11, 1979 applicant, the National Union of Hotel, Bar and Restaurant Workers, was granted leave to apply for an order of *certiorari* in respect of an award made by the Industrial Court on March 22, 1979. Notice of motion for an order of *certiorari* was taken out on August 18, 1979.

On September 13, 1980, Hotel Equatorial (M) Sdn. Bhd. gave notice of preliminary objections that —

(1) the application is caught by the Privy Council ruling in *South East Asia Fire Bricks Sdn. Bhd.* case;[1] and

(2) the application is misconceived in that it cites the Industrial Court as the respondent.

At the commencement of the hearing Mr. Thomas (for the applicant) applied to the court that the hearing of the notice of motion be amended and that Hotel Equatorial (M) Sdn. Bhd. be added as the second respondent. Since Mr. Das (for the Hotel) had no objection to the application and considering the fact that the application for leave was made *ex parte* and also that the amendment is of a formal nature the application was granted. That leaves only the question whether the motion as it now stands should be struck out in view of the Privy Council ruling referred to earlier.

In the statement the grounds upon which relief is sought are set out as follows: —

"(i) That the respondent was wrong in law in holding that the year for implementing the change of anniversary dates pursuant to Article 26 of the Collective Agreement dated May 3, 1976 between the Applicant and the Equatorial Hotel Sdn. Bhd. (hereinafter referred to as the 'Hotel') is 1977 and not 1976.

(ii) That the respondent was wrong in law in holding that the hotel was entitled to deduct overpayments made to members of the Applicant for a period exceeding three months notwithstanding section 24(2)(b) of the Employment Ordinance, 1955."

In the affidavit of the Executive Secretary of the Union dated July 23, 1979 paragraphs 7 and 8 of the affidavit describe fully the nature of the grounds as follows: —

"7. I humbly submit that the respondent made an error of law on the face of the award in holding that the year for implementing the change of anniversary dates pursuant to the article should be 1977 and not 1976. The agreement was signed on May 3, 1977 and Article (II) provides that it came into force on August 1, 1975. Hence 1976, being the first calender year following the coming into force of the agreement, should be the year when the change of Anniversary dates is implemented for the purposes of Clause (b) of the article. Clause (A) (5) of the article does not apply as the payments for 1976 would not be retrospective.

8. I also humbly submit that the respondent made an error of law on the face of the award in permitting the Hotel to deduct overpayments caused by the Hotel's mistake in its interpretation of the article. Section 24(2)(b) of the Employment Ordinance, 1955 provides that an employer is only permitted in the case of his mistake to make deductions to the extent of any overpayment made during the immediately preceding three months. It is not lawful for an employer to deduct overpayments for any period exceeding three months. Notwithstanding this section the respondent ordered that the Hotel is entitled to make deductions exceeding the said period of three months."

As far as I can see Mr. Thomas' argument is three-pronged. First, it is his contention that an ouster clause should be strictly construed and the ouster clause section 32(3) of the Industrial Relations Act, 1967 (when considered by the Privy Council in the *South East Asia Fire Brick's* case[1] it was section 29(3) then) speaks of "award" and that no award shall be challenged, appealed against, reviewed, quashed or called in question in any court. According to Mr. Thomas despite the fact that the term "award" is defined in section 2 of the Act to include also any "decision" or "order" made by the Industrial Court under the Act, since the present section 33B speaks of "award, decision or order of the court" under the Act this clearly indicates that the old ouster clause was meant *only* for an "award". With respect, I think the term "award" contained in the old ouster clause (section 29(3)/section 32(3)) must necessarily include an order of the Industrial Court under section 56(2) of the Act according to the definition in section 2 of the Act. The new section 33B would not affect the construction of section 29(3) or 32(3) then. It is also my view that the language of the new section 33B is either the result of drafting oversight or *ex abundanti cautela.*

The next contention of Mr. Thomas is that the application should now be regarded as an application under section 33A which is also a new provision inserted by Act A484 effective from May 30, 1980. The new section 33A is a provision enabling the Industrial Court to refer to the High Court questions of law after it has made an award under section 30(1). At the conclusion of the hearing Mr. Thomas abandoned this contention.

The third contention of Mr. Thomas is a more difficult one. In my view Mr. Thomas is correct in stating that there are practical difficulties encountered by the courts and the practitioners now in that whether it can be determined without going first into the full merits of the application that the error of law complained of amounts to an error of jurisdiction. Lord Reid in *Anisminic Ltd.* v. *Foreign Compensation Commission*[2] said that there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. For example, it may have given its decision in bad faith or it may have made a decision which it had no power to make or it may have failed in the course of the inquiry to comply with the requirements of natural justice. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. Lord Reid continued at page 171 as follows: —

"I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

Lord Pearce in the same case at page 195 of the judgment said that lack of jurisdiction may arise in various ways. For example, the tribunal may at the end make an order that it has no jurisdiction to make, or it may take into account matters which it is not directed to take into account.

These are all instances where error of jurisdiction is clear. But there are cases where in practice it would be difficult or almost impossible to ascertain whether an error of law on the face of the record amounts or does not amount to an error of jurisdiction unless one goes into the merits of the case. Thus there is a distinction between an error of law which

affects jurisdiction and an error of law which does not affect jurisdiction. This distinction is in fact drawn in the judgment of the Privy Council in the *South East Asia Fire Bricks Sdn. Bhd.* case[1] where Lord Fraser said: —

"But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective."

The same distinction made in the dissenting opinion of Geoffrey Lane L.J. in *Pearlman* v. *Harrow School*[3] was approved by the Privy Council —

"...the only circumstances in which this court can correct what is to my mind the error of the (county court) judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of 'structural alteration...or addition'."

Looking at the statement and the affidavit of the Executive Secretary of the Union referred to earlier two things would seem to be clear and beyond any doubt —

(1) The complaint of the applicant was lodged with the Industrial Court pursuant to section 56 of the Industrial Relations Act, 1967 and it has never been disputed that the Industrial Court had jurisdiction to entertain this complaint under that provision;

(2) That the error of law on the face of the record which was the subject of the complaint was that —

(a) the Industrial Court was alleged to be wrong in law in the interpretation of Article 26 of the Collective Agreement; and

(b) the Industrial Court was alleged to be wrong in law in the interpretation of section 24(2) of the Employment Ordinance, 1955.

At page 6 the judgment of the Privy Council in the *South East Asia Fire Bricks Sdn. Bhd.* case referred to the power of the Minister to remit to the Industrial Court. Then the judgment continues —

"The Industrial Court applied its mind to the proper question for the purpose of making their award. The award was accordingly within the jurisdiction of that court, and neither party has contended to the contrary. For the present purpose their Lordships will assume, without deciding, that the award contained one or more errors of law upon its face. If so, the error or errors did not affect the jurisdiction of the Industrial Court and their Lordships are therefore of opinion that section 29(3)(a) effectively ousted the jurisdiction of the High Court to quash the decision by *certiorari* proceedings."

Looking at the nature of the complaint lodged with the Industrial Court in the present case under section 56 of the Industrial Relations Act, 1967 and looking at the statement and affidavit of the Executive Secretary of the National Union of Hotel, Bar and Restaurant Workers, it is clear to my mind that without the necessity of going into the merits the application is caught by the ruling of the *South East Asia Fire Bricks* case. I accordingly order that the motion be struck out. Costs to the second respondent.

Motion struck out.

Solicitors: *Skrine & Co.; Shook Lin & Bok.*

PUBLIC PROSECUTOR v. KU LIP SEE

[A.Cr.J. (Yusof Abdul Rashid J.) October 20, 1980]
[Johore Bahru — Criminal Appeal No. 34 of 1979]

Criminal Law and Procedure — Charge of rape — Prima facie case — Accused asked to enter in his defence — Denial of accused — Accused acquitted — Jurisdiction of appellate court to reverse order of acquittal — Penal Code, s. 379 — Criminal Procedure Code, s. 271.

In this case the respondent had been charged with rape. At the end of the prosecution case the learned President found that the prosecution had established a *prima facie* case and he called on the respondent to enter on his defence. The defence of the respondent was an outright denial and nothing more. The learned President acquitted the respondent as he stated he was left in a real state of doubt as to the case for the prosecution and the respondent's guilt. The Public Prosecutor appealed.

Held: in the circumstances the order of acquittal must be reversed. What the learned President termed to be a real state of doubt was in fact fanciful doubt.

Cases referred to:-

(1) *Public Prosecutor* v. *Wan Razali Kassim* [1970] 2 M.L.J. 79.
(2) *Sheo Swarup* v. *King-Emperor* A.I.R. 1934 P.C. 227.
(3) *Arumugam & Anor.* v. *R.* [1947] M.L.J. 45, 47.
(4) *Public Prosecutor* v. *Datuk Tan Cheng Swee & Anor.* [1980] 2 M.L.J. 276.
(5) *R.* v. *Low Toh Cheng* [1941] M.L.J. 1.
(6) *Tara Singh & Ors.* v. *Public Prosecutor* [1949] M.L.J. 88.
(7) *Public Prosecutor* v. *Saimin & Ors.* [1971] 2 M.L.J. 16.

CRIMINAL APPEAL.

Datuk Abu Talib bin Othman for the appellant.

Teh Poh Teik for the respondent.

Cur. Adv. Vult.

Yusof Abdul Rashid J.: The respondent was acquitted and discharged by the learned President, Sessions Court, Johor Bahru on a charge of rape under section 379 of the Penal Code. On appeal by the Public Prosecutor, the order of acquittal was set aside and an order of conviction was substituted therefor, whereupon the respondent was sentenced to four years' imprisonment.

The learned President at the close of the case for the prosecution made a positive finding of facts and ruled that prosecution had established a *prima facie* case against the respondent. At page 29 of the Record of Appeal, the learned President stated:

"On evidence adduced by the Prosecution I was satisfied that PW2 *had been raped.* PW2's testimony that she had been raped was *corroborated by medical evidence.* Dr. Low Soo Eng (PW4) who examined her testified that PW2's hymen was torn. In the absence of any evidence that PW2 had indulged in forceful masturbation or that she had a fall on her private part *I accepted PW4's evidence that the torn hymen was caused by sexual intercourse.*

I accepted P1 as PW2's birth certificate and that she was born on September 2, 1965 as stated in P1. This means that at the time of the offence PW2 was 12 years 10 months old. *Her consent or otherwise as to the act of sexual intercourse was therefore immaterial as she was under the age of 14.*

With regards to the second ingredient that the accused raped her *there was no corroboration of her evidence.* Nevertheless after closely scrutinizing her evidence *I accepted her evidence that it was the accused who had raped her. The accused was no stranger to her as she had seen him for some time in the village.*